No. 93-1456

In The

Supreme Court of the United States

October Term, 1993

U.S. TERM LIMITS, INC., ARKANSANS FOR GOVERNMENTAL REFORM, INC., FRANK GILBERT, GREG RICE, LON SCHULTZ AND SPENCER PLUMLEY,

Petitioners,

v.

RAY THORNTON, BLANCHE LAMBERT, DALE BUMPERS, AND DAVID PRYOR, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Arkansas

BRIEF IN OPPOSITION OF RESPONDENTS BOBBIE HILL, ON BEHALF OF THE LEAGUE OF WOMEN VOTERS OF ARKANSAS AND DICK HERGET

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QUESTION PRESENTED

May a state disqualify a multi-term incumbent in the U.S. House of Representatives or Senate from being certified as a candidate or having his name placed on the ballot for reelection to the same office?

LIST PURSUANT TO RULE 29.1

Respondent The League of Women Voters of Arkansas is a non-profit corporation incorporated under the laws of the State of Arkansas. It has no parent companies or subsidiaries.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

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Respondents, Bobbie Hill, on behalf of The League of Women Voters of Arkansas and Dick Herget pray that the Petition for Writ of Certiorari to the Supreme Court of Arkansas be denied.

STATEMENT

As noted by Petitioners, in November 1992 Arkansas voters approved Amendment 73 to their State Constitution.

The Amendment's official popular name was the Arkansas Term Limitations Amendment. (A.2a) Although partially quoted in the Petition, the full preamble to the Amendment states:

> PREAMBLE:
>
> The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, *herein limit the terms of the elected officials.*

(A.3a-4a Emphasis added)

The Amendment contained specific provisions pertaining to candidates for the United States House of Representatives and the United States Senate. The Amendment provided as follows:

> Section 3 – Congressional Delegation
>
> (a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas.
>
> (b) Any person having been elected to two or more terms as a member of the United States Senate from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Arkansas.

A.4a-5a

Contrary to the summary of these provisions provided in the Petition at page 2, these provisions not only prohibit an incumbent's name from appearing on the ballot, but also deprive him of the opportunity to be certified as a candidate of a political party or as an independent candidate. Indeed, a literal reading prohibits even the possibility of a write in vote. The ban continues after the individual leaves office: once the specified terms have been served the individual is permanently banned as a candidate for the office.

Respondents Hill, on behalf of The League of Women Voters of Arkansas, and Herget filed suit for declaratory judgment in the Circuit Court of Pulaski County, Arkansas. Respondents alleged that Amendment 73 violated Article I of the United States Constitution by impermissibly adding qualifications to the standing qualifications for the offices of U.S. Representatives and U.S. Senators. Respondents further alleged that the Amendment violated respondents' speech and associational rights under the First and Fourteenth Amendments. Joined as defendants in the action for purposes of a declaratory judgment were members of Arkansas' Congressional Delegation, state legislators, state executive office holders and the Arkansas Democratic and Republican Parties.

The trial court granted Respondents and Congressman Ray Thornton's Motions for Summary Judgment in

part. Petitioners and others appealed to the Arkansas Supreme Court.

Concerning Amendment 73's attempt to limit the terms of incumbent United States Senators and Representatives, five of the Arkansas Supreme Court justices found that these provisions violated the Qualifications Clauses of Article I of the United States Constitution. In the plurality opinion, Justice Robert Brown, joined by two other justices, reviewed the historical evidence pertaining to the framers' intent as to the exclusive nature of the Qualifications Clauses including the Constitutional Convention's rejection of a provision requiring "rotation" in office for representatives. (A.12a) In addition, the Arkansas Supreme Court reviewed this Court's discussion of the framer's intent and its conclusion in *Powell v. McCormack*, 395 U.S. 486 (1969) that the constitutional qualifications are exclusive.

Based on this review, the plurality opinion said:

> Qualifications set out in the U.S. Constitution, unalterable except by amendment to that document, is a conclusion that makes eminently good sense. If there is one watchword for representation of the various States in Congress, it is uniformity. Federal legislators speak to national issues that affect the citizens of every state. Additional age restrictions, residency requirements, or sundry experience criteria established by the States would cause variances in this uniformity and lead to an imbalance among the states with respect to who can sit in Congress. This is precisely what we believe the drafters of the U.S. Constitution intended to avoid. The uniformity in qualifications mandated in Article

> I provides the tenor and the fabric for representation in the Congress. Piecemeal restrictions by State would fly in the face of that order.

A.14a

The plurality opinion also rejected petitioners' argument that Section 3 of Amendment 73 was simply a ballot regulation by the State permissible under Article I, Section 4 of the United States Constitution and stated:

> This effort to dress eligibility to stand for congress in ballot access clothing, that is, as a regulatory measure falling within the state's ambit under Article I, Section 4, is not without some rational appeal. We do not agree, however, that excluding a broad category of persons from seeking election to congress is a mere exercise of regulatory power. The intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service.

A.14a-15a

In a separate opinion, Associate Justice Dudley concurred in the majority's holding that Amendment 73 violated Article I of the United States Constitution, citing three reasons:

> First, the framers rejected the idea of term limits in drafting the Constitution. Second, allowing a several state to create qualifications for national office holders is antithetical to republican values. Third, the imposition of term limitations upon members of the Congress of the United States would violate the Qualifications Clause of the Constitution because it would add a qualification – lack of incumbency

> – to the requirements that are fixed by the Constitution and the several states do not have this power.

A.26a

Likewise, Justice Dudley joined in rejecting any argument that Section 3 was mere ballot regulation:

> The argument that a candidate is only barred from appearing on the ballot, but is not barred as a write in candidate, is appealing at first blush, but when one thinks about it the issue becomes clear because, as a practical matter, the Amendment would place term limits on service in the Congress. I am reassured by the style of this case, U.S. Term Limits, Inc. That name implies just what this Amendment is: a practical limit on the terms of the members of the Congress. The fact that a person can conceivably be elected as a write in candidate does not vitiate the fact that, as a practical matter, write in candidates are at a distinct disadvantage. The result would be that the qualifications clause would be violated by the Amendment.

A.27a

By separate opinion, Special Justice Gerald Brown also concurred with a majority opinion that Amendment 73 violated the Qualifications Clauses of the United States Constitution. A.41a Because a majority of the court found that Section 3 of Amendment 73 violated Article I of the United States Constitution, and rejected attempts to label Section 3 as a mere ballot regulation.

Because of the majority's ruling that Amendment 73 violated Article I, it was unnecessary for the Arkansas

Court to reach respondents' argument that, in the alternative, Section 3 of Amendment 73 also violated respondents' First and Fourteenth Amendment rights.

ARGUMENT

There is no need for this Court to accept this case. The Arkansas Supreme Court's decision is consistent with the decision of every other lower court that has ruled on the issue. Further, Arkansas Supreme Court's decision is consistent with this Court's decisions; indeed, it is compelled by the decision in *Powell*. Finally, the issue is still being considered by other state and lower federal courts and, this Court will have ample opportunity to consider the constitutionality of term limits, should a conflict arise. Indeed, this case is a poor one to consider the issue, because the Arkansas Amendment imposes a lifetime bar whose unconstitutionality is especially clear.

I. THE ARKANSAS SUPREME COURT'S DECISION IS CONSISTENT WITH ALL OTHER LOWER COURT DECISIONS

In holding that Amendment 73 violated the standing qualification clauses of Article I of the United States Constitution, the Arkansas Supreme Court reached the same conclusion as every other court that has considered whether a state may constitutionally impose term limits on federal office holders. See *Thorsted v. Gregoire*, 841 F.Supp. 1068 (W.D. Wash. 1994) (appeal pending) (Nos.

94-35222 and 94-35223, U.S.C.A., 9th Cir.); *Stumpf v. Lau*, 108 Nev. 826, 839 P.2d 120 (1992).

In *Thorsted*, the district court enjoined a voter initiated measure approved by Washington voters in the November 1992 general election. Initiative Measure 573, codified at Wash.Rev.Code § 29.68, provided in pertinent part:

> No person is eligible to appear on the ballot or file a declaration of candidacy for the United States House of Representatives who, by the end of the then current term of office will have served, or but for resignation would have served, as a member of the United States House of Representatives during six of the previous 12 years. . . . No person is eligible to appear on the ballot or file a declaration of candidacy for the United States Senate who, by the end of the then current term of office will have served, or but for resignation would have served, as a member of the United States Senate during 12 of the previous 18 years.

Without hesitation, the district court concluded that Initiative 573 imposed additional qualifications for Congress in violation of Article I, Sections 2 and 3 of the United States Constitution. In a well reasoned opinion, the district court reached the same conclusion as the Arkansas Supreme Court, i.e., the provisions amounted to state imposed qualifications for congressional office and thus violated Article I, Sections 2 and 3. The district court rejected the arguments of U.S. Term Limits and others that Initiative 573 was a mere ballot regulation. The district court, however, held in the alternative, that even if viewed as a ballot regulation Initiative 573 violated the

plaintiffs' rights under the First and Fourteenth Amendments.

In *Stumpf v. Lau*, the Nevada Supreme Court rejected a similar voter initiative limiting the terms of congressional office holders. The court held, *inter alia*, that the initiative violated Article I of the United States Constitution. The Nevada Court reasoned:

> [I]f the initiative were approved by the voters, Nevada would be approving a law or an amendment of the State Constitution that was violative of the United States Constitution and clearly beyond the powers of this State to enact.

839 P.2d at 121.

Just as in the Arkansas term limitations amendment, the Nevada proposal was expressed in terms of eligibility to have one's name printed on the election ballot, not in terms of an explicit qualification for office. The Nevada Supreme Court rejected this attempt to justify the provision and held that the initiative petition "clearly and palpably violates the qualification clauses of Article I of the United States Constitution." 839 P.2d at 120.

In both *Thorsted* and *Stumpf*, the courts reached their decision based on this Court's decision in *Powell v. McCormack, supra*, that Article I of the United States Constitution sets forth a list of qualifications for service in the House and that the founders intended that the qualifications to be exclusive.[1]

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[1] Petitioners indicate that a Nebraska court has rejected constitutional challenges to state imposed term limits for congressional office holders. (Petition at page 8, footnote 9) In

State and federal courts have been unanimous both before and after this Court's decision in *Powell v. McCormack* in holding that states may not impose additional qualifications for federal offices beyond those found in the United States Constitution. These courts have rejected residency requirements;[2] felony disqualifications;[3] disloyalty disqualifications;[4] and disqualification of state officials.[5]

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reality, the trial court refused to reach the constitutional issue finding that it was not ripe. *Duggan v. Beerman*, No. 485 (Dist. Ct., Lancaster Co., Neb., September 28, 1992. Appeal pending No. S-92-907 (S.Ct. Neb.).

[2] *Dillon v. Fiorina*, 340 F.Supp. 729 (D.N.M. 1972); *Exon v. Tiemann*, 279 F.Supp. 609 (D. Neb. 1968) (three-judge court); *State ex rel. Chavez v. Evans*, 446 P.2d 445 (N.M. 1968); *Hellmann v. Collier*, 141 A.2d 908 (Md. 1958); *cf. Strong v. Breaux*, 612 So.2d 111, 112 (La. Ct. App. 1st Cir. 1992).

[3] *Application of Ferguson*, 294 N.Y.S.2d 174 (N.Y. Sup. Ct.), *aff'd* 294 N.Y.S.2d 989 (App. Div. 1968); *Danielson v. Fitzsimmons*, 44 N.W.2d 484 (Minn. 1950); *In re O'Connor*, 17 N.Y.S.2d 758 (1940); *State ex rel. Eaton v. Schmahl*, 167 N.W. 481 (Minn. 1918); *cf. United States v. Richmond*, 550 F.Supp. 605 (E.D.N.Y. 1982).

[4] *Shub v. Simpson*, 76 A.2d 332 (Md.), *appeal dismissed*, 340 U.S. 881 (1950); *In re O'Connor*, 17 N.Y.S.2d 758 (1940).

[5] *Stack v. Adams*, 315 F.Supp. 1295 (N.D. Fla. 1970) (three-judge court); *State ex rel. Pickrell v. Senner*, 375 P.2d 728 (Ariz. 1962); *Stockton v. MacFarland*, 106 P.2d 328 (Ariz. 1940); *Buckingham v. State*, 35 A.2d 903, 905 (Del. 1944); *Lowe v. Fowler*, 240 S.E.2d 70 (Ga. 1977); *State ex rel. Handley v. Superior Court*, 151 N.E.2d 508 (Ind. 1958); *Richardson v. Hare*, 160 N.W.2d 883, 887-88 (Mich. 1968); *State ex rel. Santini v. Swackhamer*, 521 P.2d 568 (Nev. 1974); *Riley v. Cordell*, 194 P.2d 857 (Okla. 1948); *Ekwall v. Stadelman*, 30 P.2d 1037 (Or. 1934); *In re Opinion of Judges*, 116 N.W.2d 233 (S.D. 1962); *State ex rel. Chandler v. Howell*, 104 Wash. 99, 175 P. 569 (1918); *State ex rel. Wettengel v. Zimmerman*, 24

The Arkansas Supreme Court's decision is also consistent with decisions of United States Courts of Appeals which have recognized the difference between an impermissible attempt to add substantive qualifications for federal office and permissible (1) ballot regulation designed to promote orderly elections and (2) regulation of the activities of state officeholders. *See Joyner v. Mofford*, 706 F.2d 1523 (9th Cir. 1983), *cert. denied*, 464 U.S. 1002 (1983); *Signorelli v. Evans*, 637 F.2d 853 (2nd Cir. 1980). For example, both the Ninth and Second Circuits recognize that a state has a valid interest in regulating the outside activities of its state office holders, but at the same time recognize the state's inability to add substantive qualifications for federal office holders. As noted by the Ninth Circuit in *Joyner*, quoting *State ex rel. Watson v. Cobb*, 2 Kan. 32, 58 (1863):

> While we cannot interfere with the tenure of office which the United States may prescribe for its officers, it is clearly within our province to declare what effect the acceptance of such an office will have on the tenure of an officer of the state . . . when that is declared by the state constitution. . . .

Id. at 1531. Likewise in *Signorelli*, the Second Circuit noted:

> It can be argued that New York's purpose is to regulate the judicial office that Signorelli holds, not the congressional office he seeks. There is a distinct risk, however, that this line of

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N.W.2d 504 (Wis. 1946); *State ex rel. Johnson v. Crane*, 197 P.2d 864 (Wyo. 1948); *see also Cobb v. State*, 722 P.2d 1032 (Haw. 1986).

> argument . . . would permit the states, exercising their acknowledged authority to regulate occupations, to require lawyers to resign from the bar or business executives to resign corporate offices prior to seeking public office. But such a sweeping elimination of broad categories of people from those eligible for election would conflict with the express intent of the framers to maintain broad public choices of elected representatives.

637 F.2d at 859.

Contrary to petitioners' assertion, *Hopfmann v. Connolly*, 746 F.2d 97 (1st Cir. 1984), *vacated on other grounds*, 471 U.S. 459 (1985) and *Public Citizen, Inc. v. Miller*, 813 F.Supp. 821 (N.D. Ga.), *aff'd Mem.*, 992 F.2d 1548 (11th Cir. 1993), are not to the contrary. Both cases involve merely procedural ballot access ground rules, not qualifications for office. Indeed, the court in *Public Citizen* agreed that states may not add qualifications for election to Congress. Further, neither court addressed this Court's decisions holding that the ability to run as a write in candidate is not an adequate substitute for appearing on the printed ballot.[6]

II. THE ARKANSAS SUPREME COURT'S DECISION IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISIONS

In *Powell v. McCormack*, 395 U.S. 486 (1969), this Court held that Congress could not impose additional qualifications for its membership outside of the three specified in

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[6] *Anderson v. Celebrezze*, 460 U.S. 780, 799 n. 26 (1983); *Burdick v. Takushi*, 112 S.Ct. 2059, 2067 n. 7 (1992); *Lubin v. Panish*, 415 U.S. 709, 719 n. 5 (1974).

Article I – age, citizenship, and residency. Although *Powell* did not involve a state imposed qualification, its reasoning is controlling here. The Court held that the framers intended the constitutional qualifications to be exclusive. This holding was based on an exhaustive review of historical evidence available as to the framers' intent and congressional reports on similar issues. 395 U.S. at 542-47. This Court quoted with favor both Alexander Hamilton and James Madison's comments in the *Federalist Papers* on the fixed nature of the Article I qualifications.[7] Indeed, in reviewing a decision by the House of Representatives to seat a congressman in contradiction of a state imposed residency requirement, this Court referred to the question of a state's ability to add qualifications as a "more narrow issue." *Id.* at 542-543.

Numerous courts have correctly interpreted *Powell* to prohibit states from adding to the qualifications stated in the Constitution. *Joyner v. Mofford*, 706 F.2d 1523, 1528-30 (9th Cir.), *cert. denied*, 464 U.S. 1002 (1983); *Signorelli v. Evans*, 637 F.2d 853, 858 (2d Cir. 1980); *Public Citizen, Inc. v. Miller*, 813 F.Supp. 821, 831 (N.D. Ga.); *aff'd Mem.*, 992 F.2d 1548 (11th Cir. 1993). Indeed, other decisions of this Court are consistent with that. See *Bond v. Floyd*, 385 U.S. 116, 135-36 n. 13 (1966); *Davis v. Adams*, 400 U.S. 1203, 1204 (1970) (Black., J. Cir. Justice).

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[7] "The qualifications of the persons who may choose or be chosen . . . are defined and fixed in the Constitution, and are unalterable by the Legislature." *Id.* at 539, quoting the *Federalist Papers*, 371 (Mentor ed. 1961) "[t]he qualifications of the elected . . . have been very properly considered and regulated by the [Constitutional] Convention." *Id.* at 540 n. 74 quoting the *Federalist Papers*, 326 (Mentor ed. 1961).

The Arkansas Supreme Court decision is not inconsistent with this Court's decision in *Clements v. Fashing*, 457 U.S. 957 (1982). In *Clements*, this Court recognized a state's valid interest in requiring certain state officials to resign from state office before they may run for higher state or federal office. A state, like any employer, may say "while you work here, concentrate on this job." *Clements* did not involve a qualification for federal office, but a regulation governing the conduct of state offices.

The Arkansas Supreme Court's decision is equally consistent with *Storer v. Brown*, 415 U.S. 724 (1974) and other ballot access decisions of this Court upholding state ballot access laws under the time, place and manner clause of Article I, Section 4 of the Constitution.[8] Each of those cases involved only a temporary restriction or a procedural safeguard aimed at an orderly election process. None of the laws at issue permanently prohibited an otherwise qualified individual from being certified as a candidate or from appearing on a ballot for the office of U.S. Senator or Representative. Petitioner's contention that Section 3 of Amendment 73 is valid because is allows incumbents to run for office as write in candidates is totally inconsistent with this Court's holding that an opportunity to cast write in votes "is not an adequate substitute for having the candidate's name appear on the printed ballot." *Anderson v. Celebrezze*, 460 U.S. 780, 799 n. 26 (1983); *Burdick v. Takushi*, 112 S.Ct. 2059, 2065 n. 7 (1992); *Lubin v. Panish*, 415 U.S. 709, 719 n. 5 (1974).

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[8] *Burdick v. Takushi*, 112 S.Ct. 2059 (1992); *American Party of Texas v. White*, 415 U.S. 767 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971).

III. THIS COURT SHOULD AWAIT FURTHER DECISIONS IN OTHER STATE AND LOWER FEDERAL COURTS BEFORE TAKING UP THE CONSTITUTIONALITY OF STATE IMPOSED TERM LIMITS FOR FEDERAL OFFICE HOLDERS

As noted earlier, every court that has reached the merits of the issue has determined that states may not constitutionally impose term limits on federal office holders, either expressly or disguised as a ballot access measure. The issue is now before other state and lower federal courts.[9]

This Court will therefore have additional opportunities to consider the issues. The opinions and analysis of those courts may be of assistance to this Court in refining the exact issues that merit review. And if there remains a unanimous consensus in the state and lower federal courts, this Court may conclude that its review is not required.

There is a particular reason why the Arkansas initiative does not present a good case for this Court's review: it imposes a *lifetime* bar. A law making past service in congress a permanent taint is, we respectfully suggest, even more obviously unconstitutional than a law (like the Washington law now under review in the Ninth Circuit)

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[9] *Duggan v. Beerman* (oral arguments have already been held in the matter before the Nebraska Supreme Court); *Thorsted v. Gregoire*, 841 F.Supp. 1068 (W.D. Wash. 1994) (district court's decision has been appealed to the Ninth Circuit and briefing is anticipated to be completed this summer); *Plante v. Smith*, Case No. 92-CV-40410 (U.S.D.C. N.D. Fla.) (preliminary motions pending).

that merely bars *incumbents* from the ballot. For example, all arguments about the need to deal with the effects and advantages of incumbency lose their force. This is therefore not a good case for the Court to consider the constitutionality of merely hobbling incumbents.

Finally, the State of Arkansas has indicated its intention to file a Petition for Writ of Certiorari in this matter, but is not required and does not intend to do so until near the end of the 90 day period (June 13, 1994). Accordingly, in the alternative, this Court should decline to decide this Petition at this time.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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